

VERMONT LABOR RELATIONS BOARD

RICHARD BOULANGER

v.

CLAUDE A. MAGNANT AND JACQUEL-  
ANN CHOUINARD, VERMONT DEPART-  
MENT OF PERSONNEL

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DOCKET NO. 81-56

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

Richard Boulanger ("Complainant") filed an unfair labor practice charge on October 28, 1981, and subsequently amended the charge on December 21, 1981. The substance of the charge and amended charge alleged Jacquell-Ann Chouinard and Claude Magnant of the Department of Personnel ("Respondents") violated 3 VSA §961(1) by presenting Complainant with an arbitrary, inaccurate and unjustified performance evaluation. Complainant alleged the performance evaluation was issued for the purpose of denying Complainant the opportunity to apply for a newly-created Personnel Job Analysis Supervisor position; and maintained the hiring process for the Job Analysis Supervisor position was incorrectly handled by Respondents. The Vermont Labor Relations Board issued an unfair labor practice complaint on January 14, 1982.

A hearing was held at the Board hearing room in Montpelier on March 11, 1982, before the full Board. Scott Cameron, Assistant Attorney General, represented Respondents. Complainant was represented by Attorney David Kelley.

At the hearing, Complainant dropped all claims except one. He alleges the failure of Respondents to recruit for the Personnel Job Analysis Supervisor position through the Open Competitive method when only one qualified candidate had been found through the State Promotional method violated Section 9.01 of the Rules and Regulations for Personnel Administration and, consequently, Complainant was denied the opportunity to apply for the position in violation of 3 VSA §961 (1).

Requested Findings of Fact and Memoranda were filed by Complainant and Respondents on March 29, 1982, and April 9, 1982, respectively.

#### FINDINGS OF FACT

1. Complainant is, and has been since at least early 1977, a Personnel Job Analyst with the Department of Personnel. The Personnel Job Analyst is a classified position. Complainant, like all Department of Personnel employees, is excluded from belonging to a bargaining unit. 3 VSA §902(5)(H). At all times relevant, Complainant's supervisor was Claude Magnant, Director of Personnel Operations.

2. Complainant is one of two Job Analysts in the Personnel Department. In 1979, Magnant gave Complainant supervisory authority over the other Job Analyst. However, he did not perform well as a supervisor and in 1980 lost his supervisory responsibilities when he was placed in a warning period.

3. In the months preceding July, 1981, Magnant realized supervision of the Job Analysts was taking up an inordinate amount of his time. He believed he needed to secure a supervisory position for his division which would relieve him of immediate supervisory responsibilities for the Job Analyst positions.

4. In July, 1981, the position of Personnel Job Analysis Supervisor, a classified position, was created by reallocating a vacant position in the Department of Personnel.

5. There are three principal methods of hiring a person to fill a position: 1) Administratively from within - hiring an employee "in house" (within the Department); 2) State Promotional - open to all permanent-status classified employees who are not in a warning period; and 3) Open Competitive - open to anyone both within and outside State service.

6. The State Promotional and Open Competitive methods are competitive procedures in that they admit the possibility of two or more candidates.

7. The appointing officer has discretion in determining what method will be used in hiring, but 3 VSA §327(a) encourages the State to recruit from within State service. It provides:

When a vacancy within the classified service occurs, the appointing officer shall make a diligent effort to recruit an employee from within the classified service to fill the vacancy.

8. Magnant was responsible for hiring the Personnel Job Analysis Supervisor. He did not advertise the position "in-house" because, with his considerable knowledge of the Department of Personnel, he believed no one in the Department who might be interested in the position was qualified for it. Several employees who were qualified for the position were already in positions of a higher pay scale and did not wish to take an effective demotion. Magnant considered Complainant for the position and believed he was not qualified even though he had the minimum

education and experience qualifications. Magnant believed Complainant would not do a creditable job as a supervisor, as was made evident by his failure when he had supervisory responsibility over the other Job Analyst.

9. Magnant chose the State Promotional method to fill the position. On July 31, 1981, the Department of Personnel advertised the position of Personnel Job Analysis Supervisor using the State Promotional process. Under this process, the position is offered to any qualified employee for a period of seven days.

10. Also, on July 31, 1981, Magnant issued a Special Performance Evaluation Report on Complainant, covering the period March 2, 1981, to July 31, 1981. Complainant's performance was rated "2", "inconsistently meets job requirements/standards". Magnant placed Complainant in a 90-day warning period and warned him that the failure to achieve and maintain satisfactory performance could "result in further action, up to and including dismissal" (State's Exhibit 4). Complainant is not contesting this performance evaluation.

11. It is Department of Personnel policy that an employee in a warning period cannot apply for a vacant position where the State Promotional method is being used. Accordingly, Complainant was effectively precluded from applying for the Personnel Job Analysis Supervisor position as a result of being placed in a warning period. If the Open-Competitive method had been used, Complainant could have applied for the position.

12. Complainant was interested in being considered for the position. Magnant assumed Complainant was interested in the job, although Complainant never directly told Magnant he was interested in applying. Complainant spoke to Jacquél-Ann Chouinard, Commissioner of the Department of

Personnel. Chouinard told Complainant she did not think he was qualified for the job, but did not say he could not apply for it. Complainant did not apply for the job because he realized Department policy precluded him from applying.

13. Gary Vassar was the only State employee who applied for the position of Personnel Job Analysis Supervisor. Vassar was a Personnel Administrator in the Agency of Human Services, who had become disenchanted with his job due to a reorganization of Personnel jobs in the Agency.

14. Magnant knew of Vassar's qualifications. He knew Vassar's job performance was well thought of at the Agency of Human Services. Also, Vassar had excelled in a training course for classification work conducted by Magnant the year before. Magnant considered Vassar well-qualified for the job.

15. Commissioner Chouinard certified Vassar to possess the necessary qualifications for the Personnel Job Analysis Supervisor position. Vassar was not given an examination for the position.

16. Vassar was offered the position soon after the August 7, 1981, Promotional Announcement closure date, and he accepted it August 10, 1981. Vassar was appointed to the new position as a lateral transfer since the Personnel Job Analysis Supervisor position and his Personnel Administrator position with the Agency of Human Services were both Pay Scale 16 jobs.

17. Magnant is an expert on the Personnel Rules and Regulations. In his experience the Department of Personnel has never interpreted or applied the Personnel Rules to require the appointing authority to go to the Open Competitive process when only one qualified candidate has

applied through other methods, or has never required there be at least three to five candidates for a job before it can be filled. There have been many cases where it's been difficult to find even one qualified candidate.

#### OPINION

Our jurisdiction here is invoked under the unfair labor practice section of the State Employees Labor Relations Act. Complainant alleges the failure of the Department of Personnel to recruit for the Personnel Job Analysis Supervisor position through the Open Competitive method when only one qualified candidate has been found through the State Promotional method violated Section 9.01 of the Personnel Rules and Regulations. Consequently, Complainant contends, he was denied the opportunity to apply for the position in violation of 3 VSA §961(1). 3 VSA §961(1) provides: it shall be an unfair practice for an employer "to interfere with, restrain or coerce employees in the exercise of their rights guaranteed by Section 903 of this title, or by any other law, rule or regulation".

As a classified employee, Complainant is provided rights under the Personnel Rules. If we find the State interfered with Grievant's rights under Section 9.01 in filling the Job Analysis Supervisor position, we will find the State guilty of an unfair labor practice and remedy the violation.

Section 9.01 provides:

When a classified position becomes vacant or when a new position is established and such position is to be filled by competitive procedures, a request for certification shall be submitted to the Commissioner on a prescribed form. Upon receipt of such request, the

Commissioner will certify from the appropriate register the names of available persons having the three highest qualifying scores, provided that if there are fewer than five available candidates in the top three qualifying scores, the next lower qualifying score or scores shall be certified in order that an appointing authority have a minimum of five candidates with scores to consider... Candidates eligible for re-employment, transfer, demotion or restoration will be certified without scores as appropriate.

The first step in our analysis is whether Section 9.01 applies to the case at hand. The section provides that when a new classified position is established and such position is to be filled by competitive procedures, the provisions of the section shall apply. It is undisputed the Job Analysis Supervisor position is a classified position, and Claude Magnant elected to fill the position through the State Promotional method, a competitive procedure. Thus, the State was required to follow the procedures established in Section 9.01 in filling the position.

The next step in our analysis is whether the Section 9.01 procedures were followed. There is no contention here Claude Magnant did not properly submit a request for certification. Also, there is no contention Gary Vassar, the only person who applied for the position when it was advertised through the State Promotional process, was improperly certified because he did not have a qualifying score. Vassar was applying for a transfer to the position, and Section 9.01 provides candidates eligible for transfer may be certified without scores.

Rather, Complainant contends the Department of Personnel erred by not resorting to Open Competitive recruiting after having found only one qualified candidate through the State Promotional method. Complainant asserts five qualified candidates must be found before an employer can determine who to hire.

We disagree. To accept Complainant's argument would prohibit an appointing authority, who has used competitive procedures in good faith, from selecting a qualified candidate to fill a position just because five qualified candidates have not applied for the position. We believe the Section 9.01 requirement of five qualified candidates apply to hiring situations where five or more qualified candidates indicate their availability for the vacant position when a given competitive procedure is used.

Our view is buttressed by statutory language and other provisions of the Personnel Rules. 3 VSA §327(a) provides:

When a vacancy in the classified service occurs, the appointing officer shall make a diligent effort to recruit an employee from within the classified service to fill the vacancy.

Section 11.01 of the Personnel Rules is consistent with the emphasis on 3 VSA §327 on hiring from within State service in providing:

As far as practical and feasible, a vacancy shall be filled by promotion of a qualified employee based upon individual performance, as evidenced by recorded performance evaluation reports, and capacity for the new position.

Complainant would have the appointing authority recruit outside State service even though a qualified candidate was found within State service. This would frustrate the intent of §327 to encourage recruiting from within the classified service. Also, it would obstruct the State from filling vacancies quickly, contrary to legislative policy of maintaining an "efficient career service in State government". 3 VSA §312(a).

Further, the definition of "certification", as stated in Section 2.017 of the Personnel Rules, indicates the Commissioner may certify less than five qualified candidates to be considered in the filling of a vacancy:



Certification is the submission to an appointing authority of the names of one or more available persons on a register who can be considered for appointment to a particular position (emphasis added).

We conclude an appointing authority, who uses a selected competitive procedure in good faith, is not obligated by Section 9.01 to resort to alternative competitive methods to find five qualified candidates once a qualified candidate has been found through the selected competitive method.

Here, the appointing officer, Claude Magnant, used the competitive procedure of the State Promotional method in good faith. He followed the direction provided by 3 VSA §327 in recruiting for the Job Analysis Supervisor position through the State Promotional method. This opened the position to all permanent State classified employees not in a warning period. We believe resorting to this procedure constituted a serious search for qualified candidates, and was consistent with the merit system intent to select employees based on their competence. An undisputedly qualified candidate, Gary Vassar, was found through this method, and Magnant was not obligated to conduct a further search.

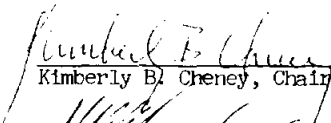
Accordingly, we find Claude Magnant and Jacquelin-Anne Chouinard did not act improperly in selecting Gary Vassar to fill the Personnel Job Analysis Supervisor position and did not interfere with, restrain or coerce Complainant in the exercise of his rights guaranteed by the Personnel Rules and Regulations. Vassar was selected consistent with legislative intent that vacancies be filled by recruiting qualified employees from within the classified service.


ORDER

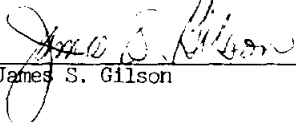
Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, we find Claude A. Magnant, Director of Personnel Operations, and Jacquelin-Ann Chouinard, Commissioner, Department of Personnel, did not violate 3 VSA §961(1), and, accordingly, the unfair labor practice complaint is DISMISSED.

Dated this 27<sup>th</sup> day of May, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
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Kimberly B. Cheney, Chairman

  
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William G. Kemsley, Sr.

  
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James S. Gilson